89-495

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JULIET BAIRD ALEXANDER, PETITIONER

V.

MASSACHUSETTS LABOR RELATIONS COMMISSION,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

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SEPTEMBER 25, 1989

25pp

QUESTIONS PRESENTED

1. Are the federal rights of trial court reporters under the Fair Labor Standards Act extinguished by the Trial Court's administration and application of Massachusetts General Law Chapter 221, Section 88?
2. Is the Massachusetts Labor Relations Commission's decision to dismiss without a hearing a legal oxymoron, in conflict with itself and the decisions of this Court and other courts?
3. Did the Massachusetts Supreme Judicial Court abuse its discretion by establishing a standard for burden of proof that is repugnant to the 14th Amendment of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Juliet Baird Alexander, and the respondent, Massachusetts Labor Relations Commission.

The respondent before this Court is the Massachusetts Labor Relations Commission.

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The petitioner, Juliet Baird Alexander, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the Massachusetts Supreme Judicial Court, entered in the above-entitled proceeding on April 27, 1989.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court is reprinted in the appendix hereto, p. 1A, infra.

The decision after reconsideration of the Massachusetts Labor Relations Commission is reprinted in the appendix hereto p.15 A, infra.

The decision of the Massachusetts Labor Relations Commission is reprinted in the appendix hereto, p. 5A, infra.

JURISDICTION

The decision of the Massachusetts Labor Relations Commission was entered on January 25, 1988; its decision on reconsideration entered on April 4, 1988. The Supreme Judicial Court of Massachusetts entered its judgement affirming the Commission's decision on April 27, 1989. On July 27, 1989, Justice Brennan signed an order extending the time for filing this petition for certiorari to and including September 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2) (3).

STATUTES INVOLVED

MASSACHUSETTS GENERAL LAW

CHAPTER 221, SECTION 88

Upon request of the presiding justice or any party, the stenographer shall furnish a transcript of his notes, or any part thereof, taken at a trial or hearing, for which he shall be paid by the party requesting it at the rate of fifty cents a hundred words for one copy and twenty cents a hundred words for each additional copy ordered at the same time. In the event that daily copy is ordered by the presiding justice or any party, the rate for the original copy shall be seventy-five cents a hundred words and thirty cents a hundred words for each additional copy. If a transcript is ordered by the presiding justice or, in a criminal case, by the district attorney, payment therefore at the same rate shall be made by the Commonwealth upon a voucher

approved by him, and, in a criminal case, the charges of transcripts furnished to said justice and to the district attorney shall be taxed like other expenses.

FAIR LABOR STANDARDS 29 USCS § 207

207. Maximum hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods

for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act (29 USCS 201-216, 217-219) by the Fair Labor Standards Amendments of 1966 (29 USCS 203, 206, 207, 213, 214, 216, 218) --

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 (Feb. 1, 1967),

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than

one and one-half times the regular rate at which he is employed.

MASSACHUSETTS GENERAL LAW

CHAPTER 150E

SECTION 11 (IN PERTINENT PART)

150E:11. Proceedings on Complaint Charging Commission with Prohibited Act; Hearing; Orders; Review; Superior Court to Enforce.

Section 11. When a complaint is made to the commission that a practice prohibited by section ten has been committed, the commission may issue an order dismissing the complaint or may order a further investigation or a hearing thereon. The commission may dismiss a complaint without a hearing if it finds no probable cause to believe that a violation of this chapter has occurred or if it otherwise determines that further proceedings would not effectuate the purposes of this chapter.

STATEMENT OF CASE

Petitioner is a court reporter employee of the Massachusetts Trial Court and a member of the bargaining unit of O.P.E.I.U. local 6. In August 1987, petitioner brought complaints before the Massachusetts Labor Relations Commission charging unlawful breach of the employment contract by the employer; failure to police the outstanding agreement by the employer-dominated union; and intimidation coercion and interference by a union agent with the exercise by employees of rights guaranteed under MGL Chapter 150E.

Notwithstanding the Labor Relations Commission's failure to address in their decision the question presented for review, the issue of federally protected overtime and the employer's illegal treatment of reporters with respect to overtime served as the underpinnings of the entire complaint.

This federal question was fairly and repeatedly raised during the entire course of proceedings. The theory of petitioner's complaint was forcefully outlined in her pro-se presentation to the hearing officer, to wit; in assessing the impact of computers, the importance of the employment status of reporters cannot be overlooked. Petitioner asserted that the contract provides that they are employees doing the work of the employer, protected, under Garcia v. San Antonio, by the provisions of FSLA and, therefore, the payment of a statutorily based page rate in lieu of overtime benefits is a violation of federal law; it was further asserted that the provision of $25,000 computers to certain employees which eliminates their overtime and still pays them a page rate is a contract violation of the grossest kind.

In considering the employer's

position that reporters are independent contractors when producing transcripts, the violation of the existing contract takes on an even more grotesque dimension. The employer's provision of high speed $25,000 equipment to certain reporters enabling them to produce court-ordered transcripts, on court premises, on court owned equipment, during the 37 1/2 hours of their salaried work week, and to pocket the statutory page rate for every page produced in such a fashion, proved two things:

1. That reporters are employees and independent contractors at one and the same time.

2. That the payment of a statutory page rate was obviously never intended by the employer to compensate reporters for overtime spent producing transcripts, but functions instead as an enlargement of the wage structure.

Petitioner argued to the Commission that this untenable situation arose thanks to three interrelated factors: An employer-dominated union that allowed the employer to deal directly with employees who were not representative of the rank and file in matters of wages and hours; an employer more interested in efficiency than fairness; a rank and file that was deliberately kept in the dark with respect to their federally protected rights.

Despite petitioner's request, a stenographic record was not permitted to be made of the preliminary hearing before the Labor Relations Commission. (See appendix page 19A, infra) Although there is no transcript, the record contains uncontroverted physical evidence of the following facts:

1. The provisions of FSLA with respect to reporters were operative as of April 15, 1986. (See appendix page 27A)

2. The employer exercised dominion and control over reporters' transcript production. (See appendix pages 28A, 29A, 30A)

3. Reporters spend onerous hours in excess of their 37 1/2 hour work week producing transcripts for the employer. (See appendix pages 33A, 35A)

4. The union qua union had no knowledge of either the effect of computers on reporters' mandatory overtime or the ultimate grant of computers to its members. (See appendix pages 30A, 31A, 32A, 38A)

5. The M.S.C.R.A. functioned as the employer's exclusive representative without legal authority and under conditions dominated and controlled by the employer. (See appendix pages 30A, 31A, 32A, 37A, 38A)

On January 25, 1988, the Labor Relations Commission issued a decision to dismiss petitioner's charges without a hearing. Although it declined to pass upon the federal question of FSLA mandated

overtime and its ramifications viz à viz the issue of high speed computer equipment, three findings in its decision require emphasis.

1. The employer made a unilateral change in the existing contract when it gave computer equipment to employees. (See appendix page 12A)

2. The union did not protest the change. (See appendix page 12A)

3. The MSCRA is not an agent of the union. (See appendix page 7A)

On February 3, 1988, petitioner requested reconsideration, citing "the Commission's failure to perceive and frame the essential and uncontroverted evidence introduced by the complaining party."

On April 4, 1988, the Commission issued a letter of reconsideration again dismissing the charges.

On April 25, 1988, petitioner took an appeal to the Massachusetts Appeals Court

pursuant to MGL Chapter 150E:11. While the focus of the appeal was the incompetence and plain error of the Commission's decision, based on a review of the entire record, the federal question of FSLA conflict was brought to the Court's attention with a fair precision in the statement of proceedings, located in the record appendix, in the statement of facts and in the body of the brief. (See appendix pages 35A,36A. Appellate brief pp.4,5,6,18)

On November 17, 1988, the Massachusetts Supreme Judicial Court, on its own motion took the case from the Appeals Court. In oral argument heard February 6, 1989, the printed text provided to that Court, petitioner brought the federal question to the Court's attention again when she asked the Court to affirm that reporters were employees when producing transcripts and to compel the payment of overtime benefits unjustly

denied.

On April 27, 1989, the Supreme Judicial Court affirmed the decision of the Commission ruling that petitioner had the burden of establishing that a prohibited practice had occurred.

REASONS FOR GRANTING THE WRIT

I

Under the employer's application of MGL Chapter 22, Section 88, the rights of employee reporters to overtime compensation as guaranteed by the Fair Labor Standards Act are irrevocably foreclosed. They must labor in the judicial vineyard, producing thousands of pages of transcript at night, at home, on weekends and holidays, for a statutory page rate that, as of May, 1988, had not changed in a decade. Produce or face the prospect of being removed from the payroll. This prevents the reporter from enjoying the benefits and protection of

his contract and, minimally, allows the employer to avoid the requirements of record keeping of wages and hours.

The Fair Labor Standards Act is sufficient to meet the demands of the reporter's predicament: "One who employs persons without conforming to the prescribed wage and hour conditions is warned that he may be subject to the criminal penalties of the Act." No more is required . . . .

United States v. Darby

312 U.S. 100 61 Sup. Ct., 451, (1941)

II

The Labor Relations Commission's decision to dismiss without a hearing constitutes an important step in the vaporization of constitutionally protected contract rights of public employees. The Labor Relations Commission is the only forum in which a public employee may bring a complaint of unfair labor practice

against his union. Procedural due process requires that the matter be resolved by a competent tribunal and in a manner consistent with essential fairness.

When, as in this case, a Commission in its rash and intemperate zeal to maintain the status quo finds the existence of per se unfair labor practice and in the same breath dismisses the charge for lack of evidence; when, as in this case, a Commission invents evidence by which it explains away a union's inexcusable negligence as lawful waiver, the public employee is dismayed by the folly and worse of its judgement, his confidence in the ability of his employment contract to protect him is destroyed.

Federal law is plainly frustrated by the distorted fact finding and intellectual pandemonium evident in the Labor Relations Commission's decision.

The statutory prohibitions to an employer's unilateral change in an existing contract and a union's abject failure to represent its members fairly and diligently, are the legislative acknowledgement of the great mischief that cannot but follow such practices. Then there is no compliance into which the unrepresented and disenfranchised employee may not be frightened.

III

The Massachusetts Supreme Judicial Court's ruling that the petitioner "had the burden of 'establishing' (emphasis provided) that a prohibited practice occurred," before she is entitled to a hearing unconstitutionally enlarges her burden of proof ex post facto, obviates the need for a Commission in the first instance and impairs, thereby, all public employees' federally protected rights to due process and equal protection of the

laws.

The public employee has a right to call for a clear statement of those perils which make it necessary that, although M.G.L. Chapter 150E, Section 11 provides for a threshold standard of "probable cause to believe," he must now secure his charge beyond doubt or dispute before the Commission will consider holding a hearing to investigate the matter.

This Byzantine requirement is singularly injudicious; it gives the state statute a construction incompatible with its plain purpose; and is, in its effects, very oppressive and vexatious to all working people.

CONCLUSION

The Trial Court's evasion of FSLA requirements, the Labor Relations Commission's exquisite triumph of bureaucratic angst over statutory obligation, and the Supreme Judicial

Court's imponderable idea that a charge has to be proven beyond doubt or dispute before it may be investigated provide a complete instance of how the best of men deceive themselves where their interests are concerned.

To be secure in the terms and conditions of his contract, the public employee must be assured of redress complete and thorough of any complaint alleging unfair labor practice.

It would be just as rational to give a frog or a rabbit, upon which the physician is about to experiment, an appeal to the zoological society as to provide contract redress for a state court employee in the form of a politically encumbered tribunal or an appeal to a panel of judges.

The employment contract of reporters in Massachusetts has become a bed of Procrustes, whereby their federally

protected rights may be stretched and summarily lopped off to fit the arbitrary measurement of an employer, a commission, or a high court.

Nothing can make it tolerable for a moment that public employees in Massachusetts, trial court reporters in particular, should be thus severed from their just expectations.

Accordingly, petitioner respectfully requests that her writ be granted and plenary consideration be given to the questions presented for review.

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